Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

LINDA HOFFMANN-PUGH,

Petitioner,

v.

MARY T. KEENAN, as District Attorney for the Twentieth Judicial District of the State of Colorado,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Colorado Rules of Criminal Procedure 6.2 and 6.3 provide that the proceedings of state grand juries shall be secret and that grand jury witnesses who appear before them must take an oath to keep their testimony secret. Violations of the Colorado grand jury witness oath are punishable by contempt proceedings, unless or until an indictment or grand jury report are issued.

The question presented is whether Colorado's grand jury witness secrecy rules 6.2 and 6.3 are an unconstitutional infringement on the First Amendment rights of witnesses appearing before the grand jury and should be invalidated under this Court's decision in *Butterworth v. Smith*, 494 U.S. 624 (1990).

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The district court's opinion (Daniel, W.Y.) granting petitioner Linda Hoffmann-Pugh's summary judgment motion (Appendix ("Pet. App.") 9a-17a) is unpublished. The court of appeals' opinion (per Seymour, joined by Holloway and Ebel, JJ.) reversing (Pet. App. 1a-8a) is published at 338 F.3d 1136.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on August 6, 2003. Petitioner Linda Hoffmann-Pugh invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

RULES INVOLVED

Colorado Rules of Criminal Procedure 6.2 and 6.3 are reprinted in the Appendix at 18a.

STATEMENT OF THE CASE

This is an action for declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 to enforce the First Amendment rights of the plaintiff.

Colorado Rules of Criminal Procedure 6.2 and 6.3 provide that the proceedings of the grand jury shall be secret and the grand jury witnesses must take an oath to keep their testimony secret. In pertinent part, Rule 6.2 states:

> All persons associated with a grand jury and its investigations or functions should at all times be aware that a grand jury is an investigative

> body, the proceedings of which shall be secret. Witnesses or persons under investigation should be dealt with privately to insure fairness. The oath of secrecy shall continue until such time as an indictment is made public, if an indictment is returned, or until a grand jury report dealing with the investigation is issued and made public as provided by law.

Rule 6.3 provides that the following oath shall be administered to each witness testifying before the grand jury:

> DO YOU SWEAR (AFFIRM), UNDER PENALTY OF PERJURY, THAT THE TESTIMONY YOU ARE TO GIVE IS THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, AND THAT YOU WILL KEEP YOUR TESTIMONY SECRET, EXCEPT TO DISCUSS IT WITH YOUR ATTORNEY, OR THE PROSECUTOR, UNTIL AND UNLESS AN INDICTMENT OR REPORT IS ISSUED?

Violations of the grand jury oath are punishable by contempt proceedings. Ms. Hoffmann-Pugh testified under the Rule 6.3 oath before the grand jury that investigated the murder of JonBenet Ramsey from 1998 until October 1999, when its term ended by law.

No indictment or grand jury report concerning that murder has been issued.

Because there is no statute of limitations on the crime of murder under Colorado law, however, a new grand jury could consider evidence and continue the investigation.

Ms. Hoffmann-Pugh wants to write a book describing her grand jury testimony about this unsolved murder, discuss it with the media, and answer questions about it from members of the public. She has not done so for fear of facing contempt proceedings for violation of the grand jury secrecy requirements.

Ms. Hoffmann-Pugh claims, and the district court agreed, that the Colorado secrecy rules violate her First Amendment rights by requiring her to remain silent even after the grand jury ended its term without issuing an indictment or report.

The district court determined that this Court's decision in *Butterworth v. Smith*, 494 U.S. 624, 108 L. Ed. 2d 572, 110 S. Ct. 1376 (1990), was controlling and granted summary judgment in favor of Ms. Hoffmann-Pugh. The court cited *Butterworth* as holding that to the extent a rule or statute "prohibits a grand jury witness from disclosing his own testimony after the term of the grand jury has ended, it violates the First Amendment." (quoting *Butterworth*, 494 U.S. at 626).

The court of appeals, however, disagreed with the district court's findings and reversed the lower court's grant of summary judgment.

This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

The petition should be granted for the following reasons:

Colorado Rules of Criminal Procedure 6.2 and 6.3 constitute a blanket prohibition of a grand jury witnesses' disclosure of their own grand jury testimony to anyone except their attorney or a prosecutor, unless or until an indictment or a report is issued, and violate the First Amendment to the United States Constitution because:

(a) the rules indiscriminately and permanently impose, in the event there is no grand jury indictment or report, under color of state law, a direct burden upon the exercise of a witness's fundamental right of free speech, while failing to serve any compelling state interest once a grand jury term has expired; and

(b) the goals traditionally deemed to justify secrecy in grand jury proceedings do not require for their preservation the blanket and potentially permanent prohibition on speech imposed therein once a grand jury term has ended, since such goals could be accomplished through means that are less restrictive on constitutionally protected freedoms; and

(c) the rules provide criminal penalties for all forms of disclosure, except for those made to a witness' attorney or a prosecutor, thereby making it a crime to utter the truth, thereby "chilling" the right to speak by people, like the plaintiff, who would otherwise exercise that right; and

(d) Rules 6.2 and 6.3 are contrary to this Court's ruling in *Butterworth v. Smith*, 494 U.S. 624, 110 S. Ct. 1376, 108 L. Ed. 2d 572 (1990), in which the Court held that

a State's interest in preserving grand jury secrecy was either not served, or was insufficient to warrant, proscription of truthful speech on matters of public concern, and that a State statute that had the effect of prohibiting witnesses from ever disclosing their testimony violates the First Amendment insofar as it prohibits a witness from disclosing his own testimony after a grand jury's term has ended.

A. The District Court Correctly Ruled That Colorado's Grand Jury Witness Secrecy Oath Is An Overbroad Restriction Upon Freedom Of Speech.

Strict scrutiny is the proper standard for evaluating Rules 6.2 and 6.3. To justify a content-based ban on speech, a state must show both that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Boos v. Barry*, 108 S. Ct. 1157, 1164 (1988); *United States v. Playboy Entertainment Group, Inc.*, 120 S. Ct. 1878 (2000) ("If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest." *Id.* at 1886); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978).

The proper standard for testing a blanket prohibition of truthful speech is articulated in *Landmark Communications* and *Smith v. Daily Mail*, 443 U.S. 97 (1979). *See also Minneapolis Star v. Minnesota*, 460 U.S. 575, 587 n.7 (1983). In fact, Rules 6.2 and 6.3 are remarkably similar to the statute invalidated in *Landmark Communications*, as both make it a crime to communicate information regarding a public investigative body, no matter how that information was obtained. Every court that has considered the issue has rightly concluded that the rationales of *Landmark Communications* and similar precedents prohibit criminal punishment of persons who file a complaint with an

investigative body and then speak about their complaint during the confidential investigation. *See First Amendment Coalition v. Judicial Inquiry & Review Bd.*, 784 F.2d 467, 477-79, 481 (3d Cir. 1986) (en banc); *Doe v. Gonzalez*, 723 F. Supp. 690, (S.D. Fla. 1988), *aff'd*, 886 F.2d 1323 (11th Cir. 1989); *Bridges v. California*, 314 U.S. 2523 (1941) (speech by party during pendency of lawsuit). It is noteworthy that these cases invalidated even a temporary ban on the speech of voluntary participants during an ongoing investigation. The instant case involves the more extreme situation of a witness who was compelled under the threat of a subpoena to testify to the investigative body and then was silenced after the investigation ended.

A *strict scrutiny* is especially appropriate in this case because Rules 6.2 and 6.3 outlaw and chill "core speech" lying at the very heart of the First Amendment. Hence, "'the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.'" *Landmark Communications*, 435 U.S. at 845, quoting *Bridges v. California*, 314 U.S. at 263. *See also Wood v. Georgia*, 370 U.S. 375, 384, 392-93 (1962); *Pennekamp v. Florida*, 328 U.S. 331, 347 (1946) (requiring a "solidity of evidence" to establish imminent danger).

Rules 6.2 and 6.3 forbid a witness ever to discuss or use information that he himself developed and possessed before he was required to divulge it to the grand jury. The witness is silenced without any particularized examination of potential detrimental effects. The dangers created by Rules 6.2 and 6.3, therefore, involve blanket government silencing of witnesses and monopolization of information developed by private citizens. In this instance the plaintiff does not seek to obtain the testimony of any other witnesses. Indeed, she does not seek any

information at all from the grand jury, with the possible exception of a transcript of her actual words recorded verbatim, because she already has the information. Linda Hoffmann-Pugh simply wants to disseminate her own knowledge about the facts of the JonBenet Ramsey murder case, and to relate an account of her personal experiences, without being subjected to criminal prosecution. *See In re Sealed Motion*, 880 F.2d 1367, 1370 n.6 (D.C. Cir. 1989).

Finally, the State overlooks the stigma that can attach to a witness who testifies before a grand jury. The public often unfairly presumes that a witness called before the grand jury has participated in wrongdoing. To the extent this perception exists, Rules 6.2 and 6.3 prevent Linda Hoffmann-Pugh, and others similarly situated, from attempting to ameliorate this stigma because they cannot discuss any aspect of their experience. When grand jury proceedings are clouded by secrecy, every witness who appears before the grand jury may be considered the "target" of the investigation by his employer, friends, and associates. If false rumors appear to link the witness with the grand jury investigation, the witness cannot protect himself. Nor can witnesses help the "target" of a grand jury investigation salvage his reputation. Rules 6.2 and 6.3 prevent a witness from declaring "I told the grand jury that he [the 'target'] was innocent." In effect, the Rules permit the State to silence the "target's" supporters. An individual should not be deprived of the right to respond to the coercive power of the government by being permanently silenced. "When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *United States v. Playboy Entertainment Group, Inc.*, 120 S. Ct. 1878, 1886 (2000)

B. The District Court Correctly Held That Colorado's Interests In Grand Jury Secrecy Can Be Protected By Means That Are Less Restrictive Of Witnesses' First Amendment Freedoms.

This Court has repeatedly insisted that a statute, to be considered "narrowly drawn," must target and eliminate "no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 108 S. Ct. 2495, 2502 (1988); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808-10 (1984). A total ban can be considered narrowly tailored "only if each activity within the proscription's scope is an appropriately targeted evil." *Frisby*, 108 S. Ct. at 2502-03. Colorado seeks to protect the integrity of its grand jury system by keeping all proceedings eternally secret. Hence, Rules 6.2 and 6.3 do much more than eliminate the exact source of the perceived evil. In fact, they are not the least restrictive means of addressing either the general concerns of Colorado or the specific interests of the parties.

Colorado's own justice system is telling proof that witness restrictions are entirely unnecessary. Like many states, Colorado can commence a prosecution by either indictment or information. However, in Colorado, the vast majority of prosecutions – perhaps ninety-six percent – begin by information. The interests in secrecy are also in these prosecutions. Yet, these investigations, which constitute over ninety-six percent of the prosecutions in Colorado, are successfully conducted without any witness secrecy whatsoever. Witnesses who speak to law enforcement officers may immediately reveal anything they have learned about the investigation. Having made the vast majority of investigations an open book, it is difficult for Colorado to argue that it has a compelling need to restrain witnesses in the four percent of those

cases that proceed by way of grand jury indictment rather than prosecutor's information.

As proof that restraining witnesses from speaking about their testimony is unnecessary, this Court need look no further than to examine the federal grand jury system. Each year thousands of federal indictments are presented without any statutory gag on witnesses. Rule 6(e) of the Federal Rules of Criminal Procedure specifically excludes grand jury witnesses from those court personnel bound by any obligation of secrecy. Thus, Rule 6(e) "does not impose any obligation of secrecy on witnesses." (*See* Fed. R. Crim. P. 6(e) advisory committee's note). Effective in 1946, Rule 6(e)'s fifty-five-year history is unequivocal proof, borne out by literally hundreds of thousands of federal indictments, that a grand jury can perform its functions successfully without any need to gag witnesses. As one commentator put it, "no empirical evidence" has suggested that permitting witnesses to speak in the federal system "has in any way interfered with the functions of the grand jury." Brown, *Witnesses and Grand Jury Secrecy*, 11 Am. J. Crim. L. 169, 181 (1983).

> There is no evidence that this breach of secrecy has diminished the effectiveness of the grand jury system or adversely affected the ability of the government to investigate crime and bring offenders to justice.

In re Russo, 53 F.R.D. 564, 570 (C.D. Ca. 1971).

The federal system has not acted in isolation. This Court in *Butterworth v. Smith*, 494 U.S. 624, 635 observed that its own survey revealed that at least thirty-five of the fifty-one states have no restrictions on witness secrecy at all. Thus Colorado is one of a minority of jurisdictions imposing any ban on the speech of witnesses who are called to testify in front of grand juries.

As well as proving that there is no good "public policy" reason for secrecy, the federal and state experiences demonstrate that there is no long common-law tradition of secrecy with regard to witnesses appearing before the grand jury. In the federal system, for example, witnesses were free to speak in most federal jurisdictions long before Rule 6(e) was enacted. According to *In re Russo*, only 33 of 85 federal district courts required witness secrecy oaths prior to the enactment of Rule 6(e). *Id.* at 570. (*See, e.g., United States v. Amazon Industrial Chemical Corp.*, 55 F.2d 254 (D. Md. 1931)). State case law has recognized a witness's right to speak without fear of prosecution as early as 1854. *See Ashburn v. Georgia*, 15 Ga. 246 (Ga. 1854).

Despite any "policy" argument the State of Colorado may make (e.g., that this Court must defer to Colorado's decision to gag its grand jury witnesses just as it must defer to the federal and state jurisdictions that have chosen otherwise), this Court noted in a similar context that matters impacting on freedom of speech cannot be treated as "policy" decisions. "Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communications*, 435 U.S. at 845. Indeed, in *Landmark Communications*, this Court based its finding of unconstitutionality in part on the fact that more than forty other states with similar review commissions had not found it necessary to enforce confidentiality through the use of criminal sanctions. *Id.* at 841.

C. The District Court Correctly Ruled That Colorado Rules 6.2 And 6.3 Represent An Unconstitutional Restraint On News Dissemination.

Colorado Rules 6.2 and 6.3 operate as both a prior restraint on speech and as a subsequent punishment of those who disclose their grand jury testimony to the media. Grand jury witnesses are prohibited from disclosing their own testimony and the news

media from disseminating the testimony of witnesses who make such disclosures. A person who violates these prohibitions can be held in criminal contempt. Book publishers and news media who might be interested in Linda Hoffmann-Pugh's account of her grand jury witness testimony realize that she risks legal sanctions by publishing her story and therefore refuse to publish it. The Rules, moreover, have the effect of not only "chilling" publication of the plaintiff's account, but of also acting as a "prior restraint." A perfect example of this "chilling" effect, and the absurd limits to which it can be carried, is to be found on page two, paragraph six of the Boulder County Attorney's Answer to Linda Hoffmann-Pugh's Complaint ("Defendant is not able to comment on whether or not Plaintiff testified before a grand jury *due to the grand jury secrecy rules.*) (emphasis added).

As this Court recognized in *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976):

> Prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights . . . The damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events.

Id. at 559. "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against constitutional validity." *New York Times v. United States*, 403 U.S. 713, 714 (1971) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (citations omitted).

Justice Holmes first noted that the First Amendment protects speakers against being punished for their utterances as well as against prior restraints. *Schenck v. United States*,

249 U.S. 47, 51-52 (1919). Since then, this Court has repeatedly held that laws and court rulings penalizing speakers for contempt for discussing or criticizing government actions are unconstitutional. *See, e.g., Bridges v. California*, 314 U.S. 252 (1941) (voiding publisher's contempt for criticizing a judge's action in a labor dispute): *Pennekamp v. Florida*, 328 U.S. 331 (1946) (voiding contempt for inaccurate accusation in newspaper during grand jury proceeding that judges were lenient toward certain individuals under grand jury investigation); *Craig v. Harney*, 331 U.S. 367 (1947) (voiding media contempt for criticizing judge's action in civil case); *Wood v. Georgia*, 370 U.S. 375 (1961) (voiding county sheriff's contempt for charging publicly that grand jury was being used for political purposes and for interfering with the grand jury.)

On numerous occasions this Court has concluded that States cannot constitutionally impose criminal or civil penalties for publishing information lawfully obtained by the news media from judicial records, other government documents or by employing routine reporting techniques. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (rape victim's name obtained from document court clerk permitted reporter to read); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (information about secret judicial inquiry board proceeding); *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97 (1979) (name of juvenile homicide suspect obtained from police and prosecutor); The *Florida Star v. B.J.F.*, 109 S. Ct. 2603 (1989) (rape victim's name obtained from document sheriff placed in press room).

In *Schenck*, Justice Holmes asserted that sanctions may be imposed against a speaker only when "the words used . . . create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." 249 U.S.

at 52. Looking back on the line of cases refining Justice Holmes' standard, this Court stated in *Bridges v. California*, 314 U.S. 252 (1941), that:

> What finally emerges from the "clear and present danger" cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.

Id. at 263.

This Court has stated that prior restraints on publication of information reporters obtain pose an even greater threat to First Amendment interests than statutes which penalize speakers after the fact.

> A prior restraint, by contrast [to a post-publication penalty] and by definition, has an immediate and irreversible sanction. If it can be said that the threat of criminal or civil sanctions after publication "chills" speech, prior restraint "freezes" it a least for a time.

Nebraska Press, 427 U.S. at 559 (footnote omitted).

It does not matter whether application of Rules 6.2 and 6.3 to grand jury witnesses is viewed as a prior restraint or a punishment after the fact. Under the decisions cited above, it could pass constitutional muster only if Colorado could demonstrate a compelling state interest in preventing witnesses from disclosing their own testimony and that, in the case at bar, disclosure would pose a "clear and present danger" to that interest. It would have to demonstrate that the grand jury witness secrecy rules are narrowly tailored to effectively serve that

interest without imposing an unnecessary burden on protected expression. *Nebraska Press*, 427 U.S. at 562.

However, the mere existence of a generalized state interest, no matter how compelling, is not sufficient to deprive a person of First Amendment protection. The State must demonstrate the need for secrecy on a case-by-case basis and it has provided no explanation of how disclosure by former Ramsey family housekeeper Linda Hoffmann-Pugh of her own grand jury testimony after the grand jury has adjourned would jeopardize any of the State's interests. The State has not even claimed that this grand jury investigation or witness is unique, justifying a restraint on witness disclosure in this case. It is precisely this vagueness with respect to the rights the State is attempting to uphold that make Rules 6.2 and 6.3 unconstitutional. The Supreme Court has held that perhaps the single most important factor affecting the clarity the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights.

D. The District Court's Ruling Accurately Describes The Colorado Rules, Which Are Unconstitutional Under *Butterworth*.

The court of appeals argues that because the Colorado rules do not preclude a witness from disclosing the information a witness acquired on his or her own before entering the grand jury room, those rules are not unconstitutional under *Butterworth*.

Nothing could be further from the truth.

To begin with, there is nothing in the plain language reading of the grand jury secrecy oath that would lead a witness to believe they were at liberty to divulge the gist of their grand jury

testimony, or to believe that referencing their discussions so as *not* to include any mention of the grand jury process would protect them from criminal contempt of court. Rule 6.3 merely states: "that you will keep your testimony secret . . . until and unless an indictment or report is issued." It is precisely because of the vagueness in the meaning of the words "keep your testimony secret" that a witness is "chilled" in their speech. The witness has to *guess* whether the word "testimony" means "verbatim" or "gist" and whether referencing their grand jury testimony discussion means "direct" or "indirect."

Vague rules and laws violate two fundamental principles of due process: (1) they leave the public (i.e., grand jury witnesses) *guessing* as to what actions are proscribed (i.e., verbatim recounting of testimony while referencing the grand jury or case discussion in which a reasonable inference can be drawn by the listener that the subject of conversation was the topic of a witness' testimony before the grand jury); and (2) they invite arbitrary and discriminatory enforcement by giving unbridled discretion to law enforcement officers (i.e., the defendant attorney's own admission that he is unable to make the simple observation in a Statement of Undisputed Facts that the plaintiff appeared before the grand jury because he *believes* he will violate Colorado's grand jury secrecy rules.) *Grayned v. City of Rockford*, 408 U.S. 104, 109-09 (1972); *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

The vagueness of the meaning of Rule 6.3's oath is a particular problem since it regulates the grand jury witness' freedom of expression. This Court has ruled that perhaps the single most important factor affecting the clarity that the Constitution demands of a law or rule is whether it threatens to *inhibit* the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or

association, a more stringent vagueness test should apply. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). In short, "[p]recision of regulation . . . must be the touchstone" where free expression is concerned. *NAACP v Button*, 371 U.S. 415, 438 (1963). Such exactitude is necessary since "[u]ncertain meanings" inevitably lead citizens to "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Id.* at 438.

E. The District Court Correctly Held That Rules 6.2 And 6.3 Are Contrary To This Court's Ruling In *Butterworth v. Smith.*

This Court, in *Butterworth v. Smith*, 494 U.S. 624 (1990), held that a State's interest in preserving grand jury secrecy was either not served or was insufficient to warrant proscription of truthful speech on matters of public concern, and that a State statute that had the effect of prohibiting witnesses from ever disclosing their testimony violates the First Amendment insofar as it prohibits a witness from disclosing his own testimony after a grand jury's term has ended.

In ruling that a Florida statute gagging grand jury witnesses was unconstitutional, this Court in *Butterworth* observed:

> Historically, the grand jury has served an important role in the administration of criminal justice. . . . At the same time, we have recognized that the invocation of grand jury interests is not "some talisman that dissolves all constitutional protections." *United States v. Dionisio*, 410 U.S. 1, 11, 93 S.Ct. 764.770, 35 L.Ed.2d 67 (1973). Indeed, we have noted that grand juries are expected to "operate within the limits of the First Amendment," as well as the other provisions of the Constitution.

Branzburg v. Hayes, 408 U.S. 665, 708, 92 S.Ct. 2646, 2670, 33 L.Ed.2d 626 (1972). See also *Wood v. Georgia*, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962). We must thus balance respondent's asserted First Amendment rights against [the State's] interests in preserving the confidentiality of its grand jury proceedings. . . .

We also take note of the fact that neither the drafters of the Federal Rules of Criminal Procedure, nor the drafters of similar rules in the majority of the States, found it necessary to impose an obligation of secrecy on grand jury witnesses with respect to their own testimony to protect reputational interests or any of the other interests asserted by [the State.] Federal Rule of Criminal Procedure 6(e)(2), governing grand jury secrecy, expressly prohibits certain individuals *other than witnesses* from disclosing "matters occurring before the grand jury," and provides that "[n]o obligation of secrecy in accordance with this rule." Notes on Rule 6(e)(2), 18 U.S.C. App., p. 726, expressly exempt witnesses from the obligation of secrecy, stating that "[t]he seal of secrecy on witnesses seems an unnecessary hardship and may lead to injustice if a witness is not permitted to make a disclosure to counsel or to an associate." Similarly, only 14 States have joined . . . in imposing an obligation of secrecy on grand jury witnesses. Of the remaining 35 states, 21 either explicitly or implicitly exempt witnesses from a general secrecy, and 14 simply remain silent on the issue. See 2 Beale & Bryson, *supra*, n. 3, 7.05, pp. 20-21, and nn. 18-21. While these practices are not conclusive as to the constitutionality of [the] rule, they are probative

> of the weight to be assigned [the] asserted interests and the extent to which the prohibition in question is necessary to further them.
>
> Against the state interests which we have just evaluated must be placed the impact of [Florida's] prohibition on respondent's ability to make a truthful public statement. The effect is dramatic: before he is called to testify in front of the grand jury, respondent is possessed of information on matters of admitted public concern about which he was free to speak at will. After giving his testimony, respondent believes he is no longer free to communicate this information since it relates to the "content, gist, or import" of his testimony. The ban extends not merely to the life of the grand jury but into the indefinite future. The potential for abuse of the [Florida] prohibition, through its employment as a device to silence those who know unlawful conduct or irregularities on the part of public officials, is apparent.

Id. Butterworth v. Smith, 494 U.S. at 634-36.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED AND FILED ON AUGUST 6, 2003

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 01-1385

LINDA HOFFMANN-PUGH,

Plaintiff-Appellee,

v.

MARY T. KEENAN, as District Attorney for the 20th Judicial District of the State of Colorado,

Defendant-Appellant.

JUDGES: Before SEYMOUR, HOLLOWAY and EBEL, Circuit Judges.

OPINION: SEYMOUR, Circuit Judge.

This case concerns the constitutionality of a Colorado statute governing the secrecy of grand jury investigations. Plaintiff Linda Hoffmann-Pugh worked as a housekeeper for John and Patsy Ramsey prior to the highly publicized murder of their daughter, JonBenet Ramsey. Due to her association with the Ramsey household, Ms. Hoffmann-Pugh was involved in the grand jury investigation of the murder. She now wishes to write a book about her experiences. Colorado requires a grand jury witness to take an oath not to

disclose her testimony, except to discuss it with her attorney or with the prosecutor, until and unless an indictment or report is issued. The oath thereby precludes the witness from divulging her testimony even after the term of the grand jury has ended if the investigation of the crime continues. Fearing prosecution under Colorado law for contempt if she discloses her grand jury testimony, Ms. Hoffmann-Pugh sought and was granted a judgment declaring she could not be prosecuted for revealing that information. The district court held that the Colorado secrecy rules violate the First and Fourteenth Amendments. The state appeals and we reverse.

I

Colorado Rules of Criminal Procedure 6.2 and 6.3 provide that the proceedings of the grand jury shall be secret and the grand jury witnesses must take an oath to keep their testimony secret. In pertinent part, Rule 6.2 states: All persons associated with a grand jury and its investigations or functions should at all times be aware that a grand jury is an investigative body, the proceedings of which shall be secret. Witnesses or persons under investigation should be dealt with privately to insure fairness. The oath of secrecy shall continue until such time as an indictment is made public, if an indictment is returned, or until a grand jury report dealing with the investigation is issued and made public as provided by law. Rule 6.3 provides, The following oath shall be administered to each witness testifying before the grand jury: DO YOU SWEAR (AFFIRM), UNDER PENALTY OF PERJURY, THAT THE TESTIMONY YOU ARE TO GIVE IS THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, AND THAT YOU WILL KEEP YOUR

Appendix A

TESTIMONY SECRET, EXCEPT TO DISCUSS IT WITH YOUR ATTORNEY, OR THE PROSECUTOR, UNTIL AND UNLESS AN INDICTMENT OR REPORT IS ISSUED?

Violations of the grand jury oath are punishable by contempt proceedings. Ms. Hoffmann-Pugh testified under the Rule 6.3 oath before the grand jury that investigated the murder of JonBenet Ramsey from 1998 until October 1999, when its term ended by law. No indictment or grand jury report concerning that murder has been issued. Because there is no statute of limitations on the crime of murder under Colorado law, however, a new grand jury could consider evidence and continue the investigation. Ms. Hoffmann-Pugh wants to write a book describing her grand jury testimony about this unsolved murder, discuss it with the media, and answer questions about it from members of the public. She has not done so for fear of facing contempt proceedings for violation of the grand jury secrecy requirements.

Ms. Hoffmann-Pugh claims, and the district court agreed, that the Colorado secrecy rules violate her First Amendment rights by requiring her to remain silent even after the grand jury ended its term without issuing an indictment or report. The district court determined that the Supreme Court's decision in *Butterworth v. Smith*, 494 U.S. 624, 108 L. Ed. 2d 572, 110 S. Ct. 1376 (1990), was controlling and granted summary judgment in favor of Ms. Hoffmann-Pugh. The court cited *Butterworth* as holding that to the extent a rule or statute "prohibits a grand jury witness from disclosing his own testimony after the term of the grand jury has ended, it violates the First Amendment." Aplt. App. at 128 (quoting *Butterworth*, 494 U.S. at 626).

We review the district court's grant of summary judgment de novo. *Simms v. Okla. ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1326 (10th Cir. 1999). In doing so, we view the evidence and draw reasonable inferences in the light most favorable to the nonmoving party. *Id.* More specifically, the district court's interpretation of state rules of criminal procedure is an issue of law we review de novo. *United States v. Maher*, 919 F.2d 1482, 1485 (10th Cir. 1990). Likewise, challenges to the constitutionality of a statute as well as the district court's conclusion as to the constitutionality of a rule are issues requiring de novo review. *United States v. Bolton*, 68 F.3d 396, 398 (10th Cir. 1995); *United States v. Castillo*, 140 F.3d 874, 879 (10th Cir. 1998).

II

In our judgment, *Butterworth* does not require invalidating Colorado's grand jury secrecy rules. In *Butterworth*, the Court considered a Florida statute permanently prohibiting a grand jury witness from disclosing not just his "testimony" but also the "content, gist, or import" thereof. Because that prohibition encompassed information the witness possessed prior to participating in the grand jury investigation, the Court determined the statute was unconstitutional. *See Butterworth*, 494 U.S. at 631-32. In making its determination, the Court distinguished its decision in *Seattle Times v. Rhinehart*, 467 U.S. 20, 81 L. Ed. 2d 17, 104 S. Ct. 2199 (1984), where it concluded the First Amendment was not infringed by a protective order prohibiting the disclosure of information obtained through judicially compelled discovery of otherwise private information. Comparing the situation in *Butterworth*, the

Court said: Here, by contrast, we deal only with respondent's right to divulge information of which he was in possession before he testified before the grand jury, and not information which he may have obtained as a result of his participation in the proceedings of the grand jury. 494 U.S. at 632. *Butterworth* makes clear that the state cannot, by calling a person as a witness, prohibit her from disclosing information she possessed beforehand, that is, the substance itself of the information the witness was asked to divulge to the grand jury.

The Colorado statute is more narrowly drawn than the Florida statute at issue in *Butterworth*. The Florida statute specifically precluded disclosing the "gist or import" of the testimony, which clearly encompassed the substance of the knowledge the grand jury witness had before entering the grand jury process. The Colorado statute, by contrast, speaks only in terms of "testimony". The Colorado Supreme Court has explicitly referred to this distinction in discussing Rule 6.2: "Grand jury secrecy is intended only to prevent disclosure of what transpires or will transpire before the grand jury." *People v. Rickard*, 761 P.2d 188, 192 (Colo. 1988). The policy of secrecy is intended only to protect against disclosure of what is said or takes place in the grand jury room. But if a document is sought for itself, independently, rather than because it was presented to the grand jury, there is no bar to disclosure. The respondent . . . here is not inquiring into any facet of what is taking place within the grand jury room. Indeed, some of the documents have not yet been presented before the grand jury. Respondent asks only to see documents which have been, or may at some time be shown to a grand jury. The request is to see these

documents for an unrelated and independent purpose. The secrecy of the grand jury would not be violated by this procedure. *Granbery v. Dist. Court*, 187 Colo. 316, 531 P.2d 390, 393-94 (Colo. 1975) (citation omitted). Thus, the Colorado statute does not prohibit disclosure of information the witness already had independently of the grand jury process.

Ms. Hoffmann-Pugh apparently wishes to disclose more than information she possessed prior to her grand jury testimony. In her complaint, she refers to publishing a book that "will include her appearance before the Boulder grand jury . . . and recount her testimony." App., tab 2 at 3. She also refers to "questions addressed to her before the Boulder grand jury, and her answers." *Id.* She says she wants to relate publicly "her experience and testimony before the grand jury." *Id.* at 5. But as the Court recognized in *Butterworth*, "grand jury secrecy remains important to safeguard a number of different interests" to preserve its proper functioning. *Id.* Reading *Butterworth* in light of *Rhinehart*, we are convinced a line should be drawn between information the witness possessed prior to becoming a witness and information the witness gained through her actual participation in the grand jury process.

As one treatise explains: "*Butterworth* does not necessarily preclude a permanent disclosure prohibition . . . where that prohibition is limited to a discussion of the specific content of the witness' testimony before the grand jury as opposed to the witness' knowledge of events discussed in that testimony." 3 WAYNE R. LAFAVE, JEROLD H. ISRAEL, & NANCY J. KING, CRIMINAL PROCEDURE,

§ 8.5(d) at 78 (2d ed. 1999) (discussing *Butterworth* and its application in *State v. Heltzel*, 552 N.E.2d 31 (Ind. 1990)). The treatise clarifies: "Full disclosure of the testimony could encompass information learned through the testimony, such as prosecution strategy (as indicated by the questions of prosecutors or grand jurors) and the differing perspectives of other witnesses (as indicated by those questions)." *Id.* at 78 n.109. In our judgment, drawing the line at what Ms. Hoffmann-Pugh knew prior to testifying before the grand jury protects her First Amendment right to speak while preserving the state's interest in grand jury secrecy.

We note, moreover, that there is a way for Hoffman-Pugh to free herself even from this restriction. Rule 6.9 of the Colorado Rules of Criminal Procedure permits a witness to apply to the court overseeing the grand jury for a copy of the witness' testimony and a determination that secrecy is no longer required. Colo. R. Crim. P. 6.9(b)(c). This rule provides a mechanism for Hoffman-Pugh to free herself of the restriction on her disclosure of her grand jury testimony at such time as the investigation is truly closed and the state no longer has a legitimate interest in preserving the secrecy of that testimony.

In sum, we agree with the state that the Colorado grand jury secrecy rules, as limited by the Colorado Supreme Court in *Rickard*, do not preclude Ms. Hoffmann-Pugh from disclosing information she possessed prior to her grand jury appearance. Contrary to the district court, we hold that the Colorado secrecy rules do not violate the First Amendment by prohibiting the disclosure of matters Ms. Hoffmann-Pugh learned from her participation in the grand jury process,

at least so long as the potential remains for another grand jury to be called to investigate an unsolved murder.

Accordingly, we **REVERSE** the district court's grant of summary judgment to Ms. Hoffmann-Pugh and **REMAND** for further proceedings consistent with this opinion.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO DATED AND FILED JULY 6, 2001

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Wiley Y. Daniel

Civil Action No. 00-D-1597

LINDA HOFFMAN-PUGH,

Plaintiff,

v.

MARY T. KEENAN, as District Attorney for the 20th Judicial District of the State of Colorado,

Defendant.

ORDER

THIS MATTER is before the Court on Plaintiff's Motion for Summary Judgment filed April 17, 2001. A hearing on the Motion was held on Thursday, July 5, 2001. Through this Motion, Plaintiff seeks a declaration that Colorado Rules of Criminal Procedure 6.2 and 6.3 are unconstitutional. The parties agree that no genuine issues of material fact exist based on the Stipulation of Undisputed Facts which was filed on April 17, 2001, as part of the Motion for Summary Judgment. The Stipulation is attached hereto as Appendix A and incorporated herein by reference.

Appendix B

Granting summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Raymond v. Mobil Oil Corp.*, 983 F.2d 1528, 1534 (10th Cir.), *cert. denied*, 114 S.Ct. 81 (1993); *Ash Creek Mining Co. v. Lujan*, 934 F.2d 240, 242 (10th Cir. 1991); *Metz v. United States*, 933 F.2d 802, 804 (10th Cir.), *cert. denied*, 112 S.Ct. 416 (1991).

As a threshold matter, Defendant argued at the July 5, 2001, hearing that she does not challenge Plaintiff's right to reveal the information she possessed about the Jon Benet Ramsey homicide prior to testifying before the grand jury. Instead, Defendant argued that Rules 6.2 and 6.3 prohibit Plaintiff from disclosing the details of the grand jury proceedings (e.g. the specific questions she was asked, what she answered, and the grand jurors' reactions to her answers). Aside from the difficulties in separating Plaintiff's knowledge prior to testifying from the answers she gave to questions asked as part of grand jury proceedings, Defendant's argument does not comport with the plain language of the rules.[1] The rules themselves prohibit Plaintiff precisely from disclosing her "testimony."

---

1. Colo. R. Crim. P. 6.2, in pertinent part, provides "(a) All persons associated with a grand jury and its investigations or functions should at all times be aware that a grand jury is an investigative body, the proceedings of which shall be secret. Witnesses or persons under investigation should be dealt with privately to insure fairness. The oath of secrecy shall continue until such time as an indictment is made public, if an indictment is returned, or until a grand jury report dealing with the investigation is issued and made public as provided by law. . . .

(Cont'd)

Appendix B

The Supreme Court in *Butterworth v. Smith*, 494 U.S. 624 (1990), addressed such a prohibition holding that insofar as a statute or rule "prohibits a grand jury witness from disclosing his own testimony after the term of the grand jury has ended, it violates the First Amendment to the United States Constitution." *Id.* at 626. I find that *Butterworth*'s holding is dispositive and requires me to grant Plaintiff's Motion.

Defendant seeks to distinguish *Butterworth*. First, she argues that the statute considered in *Butterworth* was broader than the Colorado rules. Specifically, it prohibited a grand jury witness from disclosing not only his "testimony," but also from disclosing the "gist or import thereof." While the rules at issue in this case do not explicitly prevent disclosure of the "gist or import thereof," their practical effect does just this. The, meaning of "testimony" in Rule 6.3 is vague, and there is no bright line separating a witness' testimony from the "gist or import thereof." Only by defining "testimony" as limited to the verbatim words spoken by the witness before the grand jury could such separation be achieved. Neither party argues that such a definition is operative.

(Cont'd)

Colo. R. Crim. P. 6.3 provides, "The following oath shall be administered to each witness testifying before the grand jury: DO YOU SWEAR (AFFIRM), UNDER PENALTY OF PERJURY, THAT THE TESTIMONY YOU ARE TO GIVE IS THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, AND THAT YOU WILL KEEP YOUR TESTIMONY SECRET, EXCEPT TO DISCUSS IT WITH YOUR ATTORNEY, OR THE PROSECUTOR, UNTIL AND UNLESS AN INDICTMENT OR REPORT IS ISSUED?

Second, Defendant argues that while *Butterworth* considered only a witness' right to "divulge information of which he was in possession before he testified before the grand jury," she challenges Plaintiff's right to divulge "information which [s]he may have obtained as a result of [her] participation in the proceedings of the grand jury." *Id.* at 632. In the latter case, however, Plaintiff's right to divulge the information may be restricted only in the face of "a need to further a state interest of the highest order." *Id.* (citing *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979)). Such a restriction operates as part of a system of prior restraints. "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity. The Government 'thus carries a heavy burden of showing justification for the imposition of such a restraint.'" *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (citations and quotations omitted).

As stated on the record at the hearing, I find that Defendant presents no "interest of the highest order" in support of her restriction and therefore fails to carry her burden. That no such interest exists is highlighted by the fact that this case addresses only the situation where the term of a grand jury, in which the witness' testimony was given, has already ended. Moreover, *Butterworth*'s discussion of grand jury secrecy, and recognition that the majority of states and the federal system do not have similar secrecy rules and nevertheless function well, further weigh against a finding of a compelling state interest.

Accordingly, it is

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ORDERED that Plaintiff's Motion for Summary Judgment filed April 17, 2001, is GRANTED. Insofar as Colorado Rules of Criminal Procedure 6.2 and 6.3 prohibit a grand jury witness from disclosing her own testimony after the term of the grand jury has ended, they violate the First Amendment to the United States Constitution. It is

FURTHER ORDERED that the Clerk of the Court shall enter Judgment in favor of Plaintiff, each party to bear its own costs and attorneys' fees.

DATED at Denver, Colorado, this 6th day of July, 2001.

BY THE COURT:

s/ Wiley Y. Daniel
Wiley Y. Daniel
United States District Court Judge

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. **00-D-1597 (W.Y.D.)**

LINDA HOFFMANN-PUGH,

Plaintiff,

v.

MARY T. KEENAN, as District Attorney for the 20th Judicial District of the State of Colorado,

Defendant.

STIPULATION OF UNDISPUTED FACTS

The parties hereby agree to the following undisputed facts:

1. A grand jury was convened in Boulder County in 1998, one of the purposes of which was to hear evidence in the JonBenet Ramsey murder investigation.

2. The Boulder grand jury's term ended in October, 1999 without issuing an indictment or report concerning the JonBenet Ramsey murder.

3. Under Colorado law, a grand jury term cannot exceed eighteen (18) months. C.R.S. 13-71-120.

Appendix B

4. The crime of murder has no statute of limitations. C.R.S. 16-5-401(1)(a).

5. Under Colorado law, a new grand jury could consider evidence and continue the investigation in the JonBenet Ramsey murder investigation.

6. Defendant is unable to comment on whether or not Plaintiff testified before a grand jury due to grand jury secrecy rules. Defendant will not dispute Plaintiff's assertion that she provided sworn testimony to a grand jury hearing evidence in the investigation into the homicide of JonBenet Ramsey in Boulder County in 1999. Defendant will not dispute Plaintiff's assertion that she was required to take the "Oath of Witnesses" as stated in Rule 6.3.

7. Every witness who appears before a grand jury in the State of Colorado is required to take the "Oath of Witnesses," as it appears in Rule 6.3, administered before he or she testifies pursuant to Rule 6.2.

8. A witness who violates the provisions of Rule 6.2 and 6.3 could be subject to contempt proceedings before the chief judge (or designee) of the judicial district where the grand jury was impaneled. A violation of grand jury secrecy rules could result in penalties under criminal contempt proceedings.

9. Plaintiff has stated that she wishes to write about her grand jury testimony in a book, discuss her grand jury testimony with members of the media and answer questions about her grand jury testimony with those members of the public who are interested in questioning her about it.

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10. Plaintiff has stated that she has been unable to write about, or discuss her grand jury testimony with anyone but her attorney, because she is afraid the Boulder County District Attorney will bring the matter to the attention of the chief judge (or designee) of the judicial district where the grand jury was impaneled for contempt proceedings for violating her oath of secrecy.

11. Under Colorado law the duly elected district attorney of a judicial district is responsible for enforcing the criminal laws of the state within the applicable judicial district, and the district attorney takes an oath of office to uphold those laws.

Dated: April 10, 2001

APPROVED:

s/ Darnay Hoffman
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ATTORNEY FOR PLAINTIFF
LINDA HOFFMANN-PUGH

Appendix B

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APPENDIX C – COLORADO RULES OF CRIMINAL PROCEDURE 6.2 & 6.3

Rule 6.2:

> All persons associated with a grand jury and its investigations or functions should at all times be aware that a grand jury is an investigative body, the proceedings of which shall be secret. Witnesses or persons under investigation should be dealt with privately to insure fairness. The oath of secrecy shall continue until such time as an indictment is made public, if an indictment is returned, or until a grand jury report dealing with the investigation is issued and made public as provided by law.

Rule 6.3:

> DO YOU SWEAR (AFFIRM), UNDER PENALTY OF PERJURY, THAT THE TESTIMONY YOU ARE TO GIVE IS THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, AND THAT YOU WILL KEEP YOUR TESTIMONY SECRET, EXCEPT TO DISCUSS IT WITH YOUR ATTORNEY, OR THE PROSECUTOR, UNTIL AND UNLESS AN INDICTMENT OR REPORT IS ISSUED?

Supreme Court, U.S.
FILED
DEC 4 - 2003
OFFICE OF THE CLERK

No. 03-661

In The Supreme Court of the United States

LINDA HOFFMANN-PUGH,

Petitioner,

v.

MARY T. KEENAN, as District Attorney for the Twentieth Judicial District of the State of Colorado,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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I. STATEMENT OF THE CASE

Linda Hoffmann-Pugh was a housekeeper for John and Patsy Ramsey prior to the highly publicized murder of their daughter, JonBenet Ramsey. She would like to write a book about her grand jury testimony, to discuss it with members of the media, and to answer questions about her grand jury testimony with interested members of the public. (Appendix B at 15a, ¶ 9) She claims that she has not done so out of fear of facing contempt proceedings for violation of the grand jury secrecy. (Appendix B at 16a, ¶ 10)

Rules 6.2 and 6.3 of the Colorado Rules of Criminal Procedure establish the obligation of secrecy for grand jury witnesses in Colorado. Ms. Hoffmann-Pugh sought a declaration that those rules violate her First Amendment rights. The trial court granted summary judgment in her favor, but on August 6, 2003, the Tenth Circuit reversed. It held that the Colorado grand jury rules that preserve the secrecy of witness testimony did not deprive Ms. Hoffmann-Pugh of her First Amendment rights. On October 7, 2003, the District Court entered an order and judgment in favor of the respondent in accordance with the Tenth Circuit opinion and mandate. On October 23, 2003, Ms. Hoffmann-Pugh filed her petition for a writ of certiorari. It was placed on the docket on November 4, 2003.

II. REASONS TO DENY THE WRIT

A. Introduction

The issue Petitioner presents is based on her expansive construction of state rules of criminal procedure on grand jury secrecy that conflicts with the authoritative

interpretation of those rules by the state supreme court. The Tenth Circuit opinion relies heavily on the Colorado Supreme Court's interpretation of Colorado rules. Moreover, that opinion merely reiterates the long honored rule that what happens behind the closed doors of the grand jury room is protected by secrecy. In addition, no circuit court or state high court cases conflict with the Tenth Circuit's decision on the merits. This Court should deny the petition because review would largely serve to address a discrete issue of Colorado law on a well-established legal principle.

Furthermore, the Tenth Circuit properly upheld the state rules. It construed the state rules based on Colorado Supreme Court decisions and properly concluded that grand jury secrecy in Colorado is limited to prohibiting disclosure of what occurred in the grand jury room. It also properly contrasted the effect of the Colorado rules with the effect of the Florida statute examined in *Butterworth v. Smith*, 494 U.S. 624 (1990). Finding the Colorado rules to be narrower than the Florida statute, the Court held that those rules are constitutional under *Butterworth,* particularly in light of this Court's discussion there of *Seattle Times v. Rhinehart*, 467 U.S. 20 (1984).

This Court should not review the Tenth Circuit's decision because it does not involve an important federal issue and any further review will not have immediate importance beyond the particular facts, the parties involved, and the State of Colorado.

B. The Colorado Rules Protect Grand Jury Secrecy Without Violating a Witness' First Amendment Rights.

The Tenth Circuit determined that Colorado's grand jury rules do not operate to violate Ms. Hoffmann-Pugh's First Amendment right after properly examining them under Colorado and United States Supreme Court case law.

Colorado Rule of Criminal Procedure 6.2 states:

> All persons associated with a grand jury and its investigations or functions should at all times be aware that a grand jury is an investigative body, the proceedings of which shall be secret. Witnesses or persons under investigation should be dealt with privately to insure fairness. The oath of secrecy shall continue until such time as an indictment is made public, if an indictment is returned, or until a grand jury report dealing with the investigation is issued and made public as provided by law.

Colorado Rule of Criminal Procedure 6.3 states:

> The following oath shall be administered to each witness testifying before the grand jury:
>
> Do you swear (affirm), under penalty of perjury, that the testimony you are to give is the truth, the whole truth, and nothing but the truth, and that you will keep your testimony secret, except to discuss it with your attorney, or the prosecutor, until and unless an indictment or report is issued?

Ms. Hoffmann-Pugh claimed that these rules violate her First Amendment rights by requiring her, subject to

punishment through contempt, to keep her testimony secret when, as here, no indictment or report was issued and the grand jury ended its term. By "her testimony" she means her full experience from appearing before the grand jury, not the substance of what she knew prior to her grand jury appearance. As the Tenth Circuit explained:

> Ms. Hoffmann-Pugh apparently wishes to disclose more than information she possessed prior to her grand jury testimony. In her complaint, she refers to publishing a book that "will include her appearance before the Boulder grand jury . . . and recount her testimony." . . . She also refers to "questions addressed to her before the Boulder grand jury, and her answers." . . . She says she wants to relate publicly "her experience and testimony before the grand jury."

(Appendix A at 6a) By extending her desires beyond wanting to divulge the substance of her "testimony" to wanting to divulge her experience before the grand jury, Ms. Hoffmann-Pugh raised, and the Court of Appeals considered, issues beyond what was before this Court in *Butterworth*. *Butterworth*, 494 U.S. at 629, n.2.

In Colorado, "Grand jury secrecy is intended only to prevent disclosure of what transpires or will transpire before the grand jury." *People v. Rickard*, 761 P.2d 188, 192 (Colo. 1988). (Appendix A at 6a) Thus, "The policy of secrecy is intended only to protect against disclosure of what is said or takes place in the grand jury room. But if a document is sought for itself, independently, rather than because it was presented to the grand jury, there is no bar to disclosure." *Granbery v. Dist. Court*, 531 P.2d 390, 393-94 (Colo. 1975). Based on these state authorities, the Circuit Court concluded: "Thus, the Colorado statute does

not prohibit disclosure of information the witness already had independently of the grand jury process." (Appendix A at 5a-6a)

In *Butterworth*, the U.S. Supreme Court said, "We hold that insofar as the Florida law prohibits a grand jury witness from disclosing his own testimony after the term of the grand jury has ended, it violates the First Amendment to the United States Constitution." *Butterworth*, 494 U.S. at 626. This language only appears to be dispositive if this one sentence is viewed in isolation from the remainder of the opinion. This is because throughout the opinion this Court repeatedly made the critical distinction between (1) information the witness obtained on his own and brought to the grand jury proceeding and (2) information obtained as a result of his participation in the grand jury proceeding.

The Florida statute analyzed in *Butterworth* differs markedly from the much more limited Colorado rules. Colorado Rule of Criminal Procedure 6.2 provides that "the proceedings of" the grand jury "shall be secret." Colorado Rule of Criminal Procedure 6.3 requires grand jury witnesses to keep their "testimony" secret. In contrast, the Florida statute prohibited witnesses from disclosing their testimony and "the content, gist, or import thereof . . . ." *Butterworth*, 494 U.S. at 627.

This Court described the broad effect of the words "content, gist, or import" of the testimony in the Florida statute as "dramatic," explaining that:

> *before he is called to testify in front of the grand jury, respondent is possessed of information* on matters of admitted public concern about which he was free to speak at will. After giving his

> testimony, respondent believes he is no longer free to communicate *this information* since it relates to the "content, gist, or import" of his testimony.

Butterworth, 494 U.S. at 635 (emphasis added).

This Court also rejected Florida's reliance on *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). In doing so, the Court defined the issue presented by again distinguishing information possessed by the witness before he testified from information he obtained as a result of testifying. The Court described *Rhinehart* as upholding a protective order prohibiting a newspaper from publishing information it had obtained through discovery procedures in a civil suit, and then said:

> Here, by contrast, we deal only with respondent's right to divulge *information of which he was in possession before he testified before the grand jury*, and *not information which he may have obtained as a result of his participation in the proceedings of the grand jury*.

Butterworth, 494 U.S. at 631-32 (emphasis added).

Based on this reading of the Florida statute, the Court concluded that the First Amendment right violated by the Florida statute was the "right to make a truthful statement of *information he acquired on his own*." *Butterworth*, 494 U.S. at 636 (emphasis added).

In these ways, this Court limited the issue in *Butterworth*, and therefore limited its holding. The issue and the holding involved restrictions on disclosing the information the witness acquired on his own, prior to and independent of the grand jury proceeding, in contrast to information

obtained as a result of participation in secret grand jury proceedings.

The Tenth Circuit concluded that the Colorado grand jury rules contain no prohibition comparable to that found invalid in *Butterworth*. The Tenth Circuit properly examined this Court's analysis in *Butterworth* in light of the very different secrecy provisions involved there. The Court below found that the Colorado rules preclude a witness from describing what went on behind the closed doors of the grand jury room, nothing more. A witness in Colorado remains free to discuss information of which she was in possession before she testified before the grand jury. She may not, however, relay that information by describing it in relationship to the grand jury because she only learned of that context in the course of appearing before the grand jury. Therefore, the Colorado rules do not contain the constitutional infirmity present in *Butterworth*, but instead are narrowly designed to protect the grand jury process without unduly restricting either private speech or public discussion.

C. The Tenth Circuit Decision Addresses an Issue of State Law in a Manner that Does Not Conflict With Other Appellate Decisions.

This is the only published case since *Butterworth* that addresses the validity of grand jury secrecy rules concerning testimony of witnesses. As a result, no cases from other circuit courts or state high courts conflict with the Tenth Circuit decision. In addition, as this Court recognized in 1990, approximately 21 states and the federal government exempted witnesses from any grand jury secrecy obligation, and only fourteen states imposed some obligation of secrecy on grand jury witnesses. *See, Butterworth*, 494

U.S. at 635. Thus, a ruling by this Court would not implicate the federal grand jury system, would not be relevant to more than a handful of states, and would not resolve any conflicting decisions.

Hoffmann-Pugh presents the question she would like addressed to be the constitutionality of the Colorado rules under *Butterworth*. Nonetheless, she only provides a lengthy quotation from *Butterworth* (Petition at 16-18) and does not apply the analysis or the standard of review from that case to this one. Instead, much of the petition is a recitation of black letter language from First Amendment cases to make the argument that the Colorado rules do not meet "strict scrutiny" or that the word "testimony" in those rules is vague. (Petition at 5-16) She does so despite the fact that *Butterworth* involved neither strict scrutiny[1] nor vagueness.

Ms. Hoffmann-Pugh's argument boils down to her dispute with the Tenth Circuit's application of Colorado case law. In effect, she argues that the lower court was wrong to apply the state Supreme Court's construction of its own rules. For example, she describes the Colorado rules as effecting "a blanket prohibition." (Petition at 4, 5, 6) She explains what she means by this phrase by linking it to a restriction on disclosure of information "no matter how that information was obtained." (Petition at 5) She later states that her claim is that the Colorado rules "forbid a witness ever to discuss or use information that he

[1] Instead, this Court said, "We must thus balance respondent's asserted First Amendment rights against Florida's interests in preserving the confidentiality of its grand jury proceedings." *Butterworth*, 494 U.S. at 630.

himself developed and possessed before he was required to divulge it to the grand jury." (Petition at 6) Likewise, Hoffmann-Pugh's vagueness argument is premised on her claim that the Court of Appeals was wrong in concluding that the Colorado rules do not preclude a witness from disclosing the information she acquired on his or her own before entering the grand jury room. (Petition at 14-16) In these ways, she argues that the word "testimony" as used in the Colorado oath of secrecy must be construed as extending to information obtained outside the grand jury process.

As discussed above, however, the Colorado rules do not have the effect Hoffmann-Pugh attributes to them. The language of the Colorado rules limits secrecy to testimony and to the grand jury proceedings themselves. In addition, the Colorado Supreme Court has held that grand jury secrecy "is intended only to protect against disclosure of what is said or takes place in the grand jury room." *Granbery*, 531 P.2d at 393-94; *See, also, Rickard,* 761 P.2d at 192. The Tenth Circuit was correct to rely on the approach to Colorado grand jury secrecy of the state's high court, under which secrecy is limited to protecting the proceedings themselves.

This Court's review of the Colorado Supreme Court's interpretation of its own rules would serve no national interest. Hoffmann-Pugh does not present any compelling and important federal question to justify review by the United States Supreme Court.

III. CONCLUSION

It is therefore respectfully requested that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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